ISSUE DATE: April 6, 1999

In the Matter of

GEORGE E. THADISON
Claimant

v.

INGALLS SHIPBUILDING, INC.,
Employer

and

INGALLS SHIPBUILDING, INC., c/o F.A. RICHARD & ASSOCIATES
Carrier

CASE NO.: 1998-LHC-0288

OWCP NO.: 06-163626

Appearances:

Sue Esther Dulin, Esquire
For Claimant

Paul B. Howell, Esquire
For Employer

Before: PAUL H. TEITLER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for disability compensation filed by George E. Thadison, Claimant, pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (the Act).

A formal hearing was held in Gulfport, Mississippi on July 21, 1998, at which time all parties were afforded full opportunity to present evidence and arguments as provided in the Act and applicable regulations. At the hearing, Claimant submitted exhibits 1-17, and Employer submitted exhibits 1-32. Additionally, the parties jointly submitted a stipulation sheet, which was

designated JX 1.[1] All the exhibits were admitted into evidence.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

At the hearing, the following stipulations were entered into the record:

1. The Act (33 U.S.C. §§901-950) applies to this claim.

2. Claimant and Employer were in an employer-employee relationship at the time of the accident/injury.

3. The accident/injury arose out of, and in the scope of, employment.

4. The date of the accident/injury was January 11, 1995.

5. The date that Employer was advised or learned of the accident/injury was January 11, 1995.

6. Claimant was paid total temporary disability from January 12, 1995 to March 25, 1996 at $314.24 per week for a total of $19,707.34. Medical benefits were paid under §7 of the Act.

7. Employer filed a notice of controversion on February 3, 1995.

8. The date of maximum medical improvement is March 5, 1996.

9. Claimant returned to work at Ingalls from March 25, 1996 to August 12, 1997 and from February 16, 1998 to the present.

ISSUES

Per the joint stipulation of the parties (JX 1), the following issues were presented for resolution:

1. The nature and extent of Claimant's disability, if any;

2. Entitlement to *de minimis* award;

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[1] In this decision, "DX" refers to Director's exhibits, "CX" refers to Claimant's exhibits, "JX" refers to joint exhibits, and "TX" refers to the pages of the transcript of the hearing of July 21, 1998.

3. Entitlement to compensation during layoff;

4. Average weekly wage;

5. Attorney fees, interests, penalties, and adjustments;

6. Loss of wage-earning capacity.

STATEMENT OF THE CASE

Claimant was employed by Employer for the second time beginning in February of 1991, as a first class outside machinist at the rate of $13.35 per hour for five days per week. On January 11, 1995, in the course and scope of his employment, Mr. Thadison was injured at Ingalls Shipbuilding, Inc.. At the time of his injury, Mr. Thadison was working on a hull, constructing a sonar dome. As he lifted a stage out of the crate to put it on the dome, he injured his neck, back, and both shoulders.

Claimant was treated by Dr. Danielson, who diagnosed a ruptured disk at C-5, 6. Dr. Danielson performed an anterior cervical diskectomy on Claimant on June 16, 1995. He released the Claimant to perform work within certain restrictions.

Claimant received temporary total disability benefits from January 12, 1995 to March 25, 1996 at the rate of $314.24 per week. Thereafter, on March 25, 1996, Claimant returned to work for the Employer, performing light duty work through the Employer's return to work program. Claimant was laid off from August 11, 1997 to February 16, 1998. After the layoff period, he returned to work with Employer as a truck driver.

Claimant claims that he was underpaid during the period in which he received temporary total disability payments. He also contends that he is entitled to permanent total disability from the date of MMI to the date that he was offered employment with Employer and returned to work, and total disability benefits during the period of time in which he was laid off. Finally, he claims that he is entitled to partial disability payments for loss of wage earning capacity, based on the difference in post-earning wages. In the alternative, he seeks a *de minimis* award.

SUMMARY OF THE EVIDENCE

Testimony of George E. Thadison

George E. Thadison, the Claimant, testified at the hearing on July 21, 1998. Mr. Thadison testified that he has a high school education, and is certified as a sheet mechanic. (TX 26). Mr. Thadison's work history, which included positions as a supply clerk, laborer, machine operator, and production foreman. (26-33).

Mr. Thadison testified about several work-related injuries which occurred prior to the injury at issue in the present case. On July 21, 1991, he fell from a ladder while employed by Ingalls Shipbuilding, hurting his neck and back. (TX 37). He did not lose any work time as a result of this accident. (TX 37). On July 6, 1993, he was dehydrated and suffered from heat exhaustion, missing five days of work as a result. (TX 37). He was able to return to work and perform the full duties of his job. (TX 37-38).

Mr. Thadison testified that he began working for Ingalls Shipbuilding for the second time on February 25, 1991, as a first class outside machinist. (TX 38). At the time of his injury on January 11, 1995, he was earning $13.35 per hour, and was working at least 40 hours per week. (TX 38-39). As an outside machinist, Mr. Thadison's duties included grinding, drilling, fabricating, sorting, stooping and climbing. (TX 39). His job required him to climb ladders on the boat every day, and to bend occasionally. (TX 40). The job also required Mr. Thadison to lift objects weighing 50 to 75 pounds approximately 8 to 10 times a day. (TX 40). Mr. Thadison was often required to work overhead, drilling holes, or fastening and tightening bolts. (TX 40-41). Mr. Thadison testified that working overhead comprised approximately 20 to 25 percent of his job. (TX 41). He also stated that he was required to stand all the time, and was reprimanded if he was caught sitting down. (TX 41).

Mr. Thadison testified that on January 11, 1995, he began working on the first shift at 7:00 am. His injury occurred between 9:00 and 9:30 a.m. At the time of his injury, he was working on the ground, near the water. (TX 42). He was working on a sonar dome, picking up stages[2] to go on the dome and torquing bolts with an extended wrench. (TX 42). Mr. Thadison testified that each stage weighed approximately 50 to 75 pounds. (TX 43). A co-worker, Gerald McNair, was assisting Mr. Thadison in lifting the stages. (TX 43).

Mr. Thadison stated that while lifting the stages, and putting them on the platform, he felt a sharp pain in his back, neck, and shoulder. (TX 43). He also felt tingling in his arm and leg. (TX 43). He reported the pain to his supervisor, Buster Tapp. (TX 43). Mr. Thadison continued to work until 11:00 or 11:30, when the pain became so severe that he could not work anymore. (TX 44). He told his supervisor, who advised him to go to the hospital emergency room. (TX 44).

Mr. Thadison stated that he went to the Employer's hospital, and was seen by Dr. Warfield. (TX 44). Dr. Warfield gave him some pain pills, provided heat treatment, and advised Claimant to take the rest of the day off. (TX 44). Claimant went home, and was unable to return to work the next day because the pain was still severe. (TX 45). Several days later, Claimant returned to the Employer's hospital and was again seen by Dr. Warfield. (TX 45). Dr. Warfield took an x-ray, and recommended that Claimant see Dr. Danielson. (TX 45).

Claimant testified that he saw Dr. Danielson on January 19, 1995. (TX 45). Mr. Thadison told Dr. Danielson that he had pains in his middle lower back, neck, shoulders, arms, and legs, and that he was also experiencing headaches. (TX 46). Dr. Danielson recommended

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[2] Claimant testified that a stage is a support bracket to hold the sonar dome up. (TX 93).

that Claimant undergo an MRI. (TX 46). Claimant went to Dr. Howard Smith for a second opinion, and Dr. Smith also recommended that Claimant have an MRI. (TX 46). A cervical MRI was taken on February 24, 1995. (TX 46). Claimant stated that the doctors told him the MRI showed that he had damaged some of the disks in his middle lower back and neck. (TX 47). On March 22, 1995, Claimant had a cervical lumbar myelogram, which was followed up with a CT scan. (TX 47). The doctors told Claimant that these tests showed damaged disks in Claimant's neck and lower back. (TX 47). The doctor recommended that Claimant undergo neck surgery, and Dr. Howard Smith concurred in this recommendation. (TX 47). Mr. Thadison underwent neck surgery and fusion in June of 1995.[3] Following surgery, Mr. Thadison continued to be treated by Dr. Danielson for continuing pain in his back, neck, arms, and shoulders, and for depression. (TX 48). Another cervical MRI was performed on October 23, 1995. (TX 49). After the MRI, Dr. Danielson recommended that Claimant see a pain doctor and a psychiatrist. (TX 49). Authorization for these treatments was initially denied by F.A. Richard. (TX 49). Claimant was sent to Dr. Smith for a second opinion. (TX 49). Dr. Smith agreed with Dr. Danielson's recommendation. (TX 50).

In January of 1996, Claimant returned to Dr. Danielson. (TX 50). Claimant testified that his physical condition was the same, and that he was still depressed. (TX 50). At that time, Dr. Danielson sent Claimant for a functional capacity evaluation. (TX 50). Claimant testified that after the functional capacity evaluation, Dr. Danielson gave him a written report regarding his physical restrictions. (TX 51). Claimant's last visit with Dr. Danielson was on March 5, 1996. (TX 51).

Claimant returned to work for Ingalls on March 25, 1996 under the restrictions provided by Dr. Danielson. (TX 52). Claimant testified that when he returned to work, he was making more money per hour than he was making at the time of injury. (TX 100). He was still a member of the same union, and had the same seniority that he had at the time of injury. (TX 101). Following Claimant's return, he worked painting lockers, making gaskets, cleaning the boiler shop, and doing office work. (TX 58). Tommy Sanders oversaw Claimant's return to work for the Department of Labor. (TX 58-59). Claimant testified that he was satisfied with the job, although it caused him severe pain in his back, neck, shoulders, legs and arms. (TX 59). He testified that he constantly works in pain. (TX 59). He also stated that he is unable to take pain medication at work because it makes him drowsy. (TX 60).

In approximately June of 1996, Claimant stopped seeing Dr. Danielson and began seeing Dr. Joe Jackson, who is a neurologist and psychiatrist. (TX 61-2). He saw Dr. Joe Jackson for the first time on June 24, 1996. (TX 61). He told Dr. Jackson about his pain and depression. (TX 62). Claimant testified that prior to seeing Dr. Jackson, he had thought about suicide several times because he was depressed about not being able to perform his job. (TX 62). Claimant stated:

I've never been a lazy person. I always have worked, and I jut felt that I — that even

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[3] The hospital records show June 16, 1995 as the date of surgery, but Mr. Thadison testified that he recalls the surgery date as June 13, 1995, which is his birthday.

> though I had a job to do, but it wasn't within my trade. And I just feel that I was, you know, I just got depressed because I wasn't able to do the job, and I hurt all the time, and I didn't feel like I was going to get better. And in fact, I didn't get any better, and that just caused me to be depressed all the time.

(TX 62). Dr. Jackson recommended several medicines for pain, and offered physical therapy and acupuncture. (TX 63). Claimant testified that he underwent the acupuncture, even thought it was not authorized by F.A. Richards, but it only relieved his pain on a short term basis. (TX 63). Dr. Jackson also prescribed Prozac for a period of time, but Claimant had to discontinue the medication due to side effects. (TX 64).

In July of 1996, Claimant began working as a truck driver. (TX 61). He continued to perform this job until he was laid off on August 15, 1997. (TX 64). Claimant admitted that the layoff was due to a reduction in force due to lack of contracts, and that he was laid off based on his level of seniority. (TX 111-112). After being laid off from Ingalls, Claimant looked for other work. (TX 65). He stated that he needed to work because he had no income outside of his unemployment benefits of $180 per week,[4] and his wife was sick and needed medicine. (TX 65). Claimant testified that he was offered a job at Ingalls as a firewatch, but he was unable to perform the physical requirements of the job. (TX 66). Claimant testified that when he applied for jobs, he would ask for light duty jobs at the interview. (TX 66). If the job was not within his restriction, he would tell the employers that he could not do the job. (TX 66). Claimant also testified that he applied for work at the employment office on the same day he got laid off. (TX 67).

Claimant applied for jobs at Ham Marine, Redman Homes, Home Depot, Labor Finders, Wal-Mart, Gulf Coast Security, West Building Supply, Day Detectives, Hudson's Hometown Supply, Hubble Supply, Gene Warr, Auto Zone, Toy Liquidation, K&B Drugstore, Telemarketer, and Gulfport Memorial Hospital. (TX 67-73). Claimant testified that he was told at each job that there was either no work available at that time, or that the work available was not within his restrictions. (TX 67-73). Claimant also applied with the Mississippi Department of Rehabilitation for placement, but did not receive a job. (TX 68). Claimant testified that there were two jobs that he was told about that he did not apply for. One was in Pearlington, which is 50 or 60 miles from Claimant's home. (TX 74). The other job was with Swetman Security in Biloxi, but Claimant did not have transportation to get there. (TX 74). On cross-examination, Claimant was asked why he only applied to one job in September of 1997, two jobs in October of 1997, and no jobs in November of 1997. Claimant stated that for a period of time he didn't have transportation and that he did not keep a record of every time he looked for a job. (TX 115).

In February of 1998, Claimant received notification from Ingalls to return to work. (TX 73). He returned to work as a truck driver. (TX 73-74). Claimant testified that when he returned to work, he was making $14.07 per hour, and had the same level of seniority that he had previously had. (TX 128). He stated that he loves the job, but it causes him physical problems.

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[4] Claimant testified that he received $180.00 per week in employment benefits for six months. (TX 112).

(TX 75). He is required to climb in and out of the truck every day. (TX 75). He also stated that the roads in the shipyards are bad roads. (TX 75). He also stated that he is sometimes required to make quick motions with his neck to back up. (TX 75). He testified that he cannot take pain medication at work, so when he gets home he takes a bath and soaks in Epsom salts and takes his pain medication. (TX 75).

Claimant testified that he is never free from pain, whether he is at work or at home. (TX 76). His activity at work increases his pain. (TX 76). He stated that he is unable to sleep well at night due to the pain, which wakes him. (TX 77). Claimant has to have help from his co-workers in order to perform his job about 10-15 times per week. (TX 78). He stated that when he picks up heavy parts, he has to get assistance from co-workers to unload the truck. (TX 78).

Claimant testified that he had heard that the month before the hearing, 25 people in his department were scheduled to be laid off, and he was number 35. (TX 80). This layoff was postponed. (TX 80). He also testified that he is still a member of the union, and that under the union contract his job is protected from layoff except based upon seniority. (TX 134).

On cross-examination, Claimant was shown his wage statement from 1994, which was admitted into evidence as EX 5. Claimant was asked if he could explain why the statement showed that more than half the time, he did not work a forty hour week. (TX 91). Claimant said that he did not know why he was working less than forty hours, and indicated that if he had a lot of absences, he would have received warning slips. (TX 91). Claimant stated that he did not work two weeks in June 1994 because he took a leave of absence to attend the National Baptist Convention. (TX 92).

Mr. Thadison testified that he is able to sit about 20 or 30 minutes before he needs to stand up. (TX 82). He is not able to climb, and is able to bend some. (TX 82). He can walk about a half mile before he needs to stop and rest. (TX 82). Claimant testified at the hearing that his pain has not improved significantly since the surgery. (TX 50). Claimant testified that he is still depressed today. (TX 62). He testified that all of his medical bills have been paid. (TX 133).

Testimony of Barbara Melinda Wiley

Ms. Wiley testified at the hearing held on July 21, 1998. She testified that she is an employee relations representative at Ingalls Shipbuilding. (TX 142). Her primary duty at Ingalls is to assist injured workers in their return to work at Ingalls. (TX 142). She heads the return to work committee, which researches areas in the shipyard where employees who have been released with permanent work restrictions can be placed. (TX 143). Jobs are identified based on the physician's release form, which states the employee's physical restrictions. (TX 155). She testified that the Department of Labor monitors the industrial return to work program. (TX 143).

Tommy Sanders acted as the monitor in the case of George Thadison. (TX 143). The monitor's job is to gather information regarding placement, visit the job site, speak to the employee, supervisors, and co-workers, and develop information for the Department of Labor as

to whether the employer is complying with the restrictions. (TX 143).

Ms. Wiley testified that the jobs identified for Mr. Thadison were within his doctor's limitations. (TX 144). She stated that both Mr. Sanders and Mr. Joe Walker, an independent rehabilitation counselor, found that the jobs identified for Mr. Thadison were suitable. (TX 144-145). Ms. Wiley also testified that the decision to layoff Mr. Thadison was unrelated to his injury; rather, it was based on seniority. (TX 147).

Ms. Wiley testified that there are no layoffs now or in the foreseeable future at Ingalls, and that Ingalls is currently hiring. (TX 149). She also stated that Mr. Thadison was paid unemployment during the period that he was off work from Ingalls, and that the state charged Ingalls' account for unemployment paid to Mr. Thadison. (TX 151).

Dr. Danielson's Medical Records

Claimant submitted Dr. Danielson's medical records as CX 7, and Employer submitted Dr. Danielson's medical records as EX 18.[5] I do not include the entire medical record here, rather, the records are summarized in pertinent part. A report dated January 19, 1995 was submitted. (CX 7 at 30). The report indicates that Claimant reported to Dr. Danielson that he was injured at Ingalls while torquing bolts and lifting platforms. Claimant reported neck pain, pain in both shoulder joints, pain in both shoulder blades, and pain in both arms. (CX 7 at 30). Dr. Danielson performed a neurological examination, and recommended that Claimant undergo a cervical MRI scan. (CX 7 at 31).

A radiology report, dated February 24, 1995, was submitted as CX 7 at 27. The report indicates a mild C5-6 disc herniation with mild compression of the cervical cord and mild bilateral intervertebral foraminal stenosis. The report also indicates mild bilateral C4-5 and left C6-7 foraminal stenosis. (CX 7 at 27). An additional radiology report, dated March 22, 1995 provides the results of several CT scans. The radiologist, Frank L. Schmidt, opined that the CT of the cervical spine showed central disc herniation at C5-6 which does not encroach on the cord; that the CT of the thoracic spine showed the possibility of disc herniation on the left of T7-8, and that the CT of the lumbar spine showed a small central herniation at L4-5. The report also indicates that a total myelogram was performed, which revealed an anterior defect of C5-6 suggesting disc herniation bilateral defects at this level. (CX 7 at 25).

A follow-up report of Dr. Danielson, dated May 9, 1995, was submitted as CX 7 at 21. In the report, Dr. Danielson opined that the patient should undergo an anterior cervical diskectomy with donor bone fusion at C5/6. (CX 7 at 21). An operative report dated June 16, 1995, indicated that an anterior cervical diskectomy was performed on Claimant. (CX 7 at 18).

Follow-up reports dated June 29, 1995, August 9, 1995, October 10, 1995, November 2, 1995, December 7, 1995, and January 18, 1995 were submitted as CX 7 at 6-15. All of these

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[5] The material submitted by both parties was substantively the same, and so for the sake of brevity, this Decision cites only to the Claimant's exhibit.

reports conclude that Claimant remains temporarily totally disabled.

A functional capacity evaluation, completed by Dr. Danielson, was submitted as CX 7 at 6. The evaluation indicated that Claimant could perform light medium work, which was defined as lifting 35 lbs on an occasional basis, lifting 15 lbs on a frequent basis, and lifting 7 lbs on a constant basis. The evaluation also indicated that Claimant was capable of performing the following functions on a continuous basis: squat, kneel, crawl, balance, sit, stand, walk, alternately sit/stand, use foot controls, climb stairs, functional movement of both left and right feet, and repetitively bend. Additionally the evaluation indicated that Claimant could perform the following functions on a frequent basis: bend, reach above shoulder level, use hand controls, climb ladders, and repetitively squat. (CX 7 at 7). Dr. Danielson concluded that the Claimant had an impairment rating of 9% of the person as a whole. (CX 7 at 5).

A follow up report dated March 5, 1996, was submitted as CX 7 at 3. The report indicated that Mr. Thadison had a little bulging of the annulus at C3-4 and C4-5, and some degree of foraminal stenosis on the left at C6-7, but no focal disc herniation was seen on his October 23, 1995 MRI scan. Dr. Danielson also noted a small central herniation at his back at L4-5 and a possible disc at T7-8. Dr. Danielson wrote that Claimant needs to avoid rapid head/neck movements, prolonged extension of head/neck, working/stacking overhead, ladder climbing, and repetitive squatting and trunk forward bending. Dr. Danielson reported that Claimant reached MMI as of March 5, 1996, and that his restrictions are permanent. (CX 7 at 3).

Records of Sanders & Associates

A vocational rehabilitation evaluation and labor market survey, completed by Tom Stewart, a Vocational Rehabilitation Consultant, was submitted as CX 10. The report summarized Mr. Thadison's history of injury and medical treatment, personal and social background, education and military experience, work history and transferable skills, and current medical status. (CX 10 at 2).

The report noted that Mr. Thadison had attained some supervisory and inspector skills, however, the report indicated that his supervisory and inspector skills were specific to the industries in which he was employed, and were not of particular value outside those industries. (CX 10 at 3).

Mr. Stewart's report stated that considering Claimant's age, educational achievement, military experience, work history, and the physical/work restrictions assigned by Dr. Danielson, he felt that Claimant could work "within a limited range of unskilled, sedentary to light jobs," such as Gate Guard, Security Guard, Security Monitor, Motel Front Desk Clerk, Fuel Booth Cashier, and/or Parking Lot Cashier or attendant. (CX 10 at 4). Based on Claimant's profile, Mr. Stewart identified the following jobs which he opined that Claimant could perform:

1. Security Guard, Gulf Coast Security Services ($5.15/hour; 40 hours per week)
2. Security Guard, Day Security Services ($5.15-$5.50/hour, 40 hours per week)
3. Security Guard, Swetman Security Services ($5.15/hour, 40 hours per week)

4. Security Guard, West Building Materials ($7.00/hour, 19.5 - 30 hours per week)
5. Gate Guard, Pinkerton Security Services ($5.15/hour, 16 to 24 hours per week)

Mr. Stewart indicated that he notified Mr. Thadison of these jobs, and that Mr. Thadison expressed that he would check into these openings, but that he had been advised by Ingalls that he was close on the list with respect to being called back to work on light duty.

Additional Evidence of Record

In addition to the evidence summarized above, Claimant submitted the following evidence: Employee's Claim for Compensation (CX 1); Employer's first report of injury (CX 2); Wage Statement of Claimant (CX 3); Claimant's Personnel File with Employer (CX 4); Ingall's Hospital Records of Claimant (CX 5); Ingall's Return to Work Program Forms (CX 6); Medical Records of Dr. Jackson (CX 8); Medical Records of Dr. Smith (CX 9); LS-208 Form (CX 11); Job Search Forms (CX 12); LS-18 (CX 13); Subpoena to Ingalls 30(b)(6) Representative (CX 14); Claimant's Responses to Employer's Objection to Motion to Remand (CX 15); Employer's Responses to Consolidated Recovery (CX 16) and Post-Injury Wages (CX 17). Employer submitted the following evidence: Application for Employment (EX 1); Ingalls Accident Form (EX 2); LS-202 (EX 3); Choice of Physician Form (EX 4); Wage Statement (EX 5); LS-206 (EX 6); LS-208 (EX 7); LS-203 (EX 8); LS-207 (EX 9); Petition for Second Injury Fund Relief (EX 10); LS-18 (EX 11); LS-18 (EX 12); Answers to Interrogatories (EX 13); Claimant's Motion to Remand (EX 14); Employer's Objection to Claimant's Motion to Remand (EX 15); Motion for Summary Decision (EX 16); Ingalls Infirmary Records (EX 17); Medical Records of Dr. Smith (EX 19); Functional Capacities Evaluation (EX 20); Medical Records of Dr. Jackson (EX 21); Medical Records of Dr. Elias G. Chalhub (EX 22); Medical Records of Dr. Eugene D. McNally (EX 23); Medical Records of Dr. Arthur Matthews (EX 24); Correspondence offering post-injury employment (EX 25); Documentation re: Layoff (EX 26); Vocational Rehabilitation Reports of Mr. Tommy Sanders, C.R.C. (EX 27); Rehabilitation Report of Mr. Walker (EX 28); Post Injury Wage Statement (EX 29); Affidavit of Claimant's Supervisor (EX 30); Ingalls Return to Work Release (EX 32); and Deposition of Claimant (EX 33). Additionally, a stipulation sheet was submitted as a joint exhibit. (JX 1). All of this evidence has been carefully considered in the course of evaluating Claimant's case.

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

In arriving at a decision in this matter, the Administrative Law Judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968) *reh'g. den.* 391 U.S. 929 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

The person seeking benefits under the Longshore Act has the burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 115 S.Ct. 2251, 28

BRBS 43 (CRT) (1994). Such burden of persuasion obliges the person claiming benefits to persuade the trier of fact of the truth of a proposition. This burden is not met where the person claiming benefits simply comes forward with evidence to support a claim.

To determine the benefits Claimant is entitled to in this case, I must consider whether Claimant is entitled to receive benefits, and the amount of benefits due, if any, during several periods of time. First, the period from January 12, 1995 (the date of the accident) through March 4, 1996. Next, the period from March 5, 1996 (the date of MMI) through March 25, 1996. Next, the period from March 26 (when Claimant was placed with Employer) through August 10, 1997. Next, the period from August 11, 1997 (when Claimant was laid off) to February 15, 1998. Finally, I must determine Claimant's current eligibility for benefits after February 16, 1998 (when Claimant was again placed with Employer).

1. Claimant's Entitlement to Benefits from January 12, 1995 to March 4, 1996

The parties stipulate that Claimant received temporary total disability benefits from January 12, 1995 through March 25, 1996, at the rate of $314.24 per week. (JX 1). This payment was made based on an average weekly wage (AWW) of $471.35, as the briefs of both parties indicate. Claimant, however, argues that his benefits should have been based on an AWW of $562.15, which would indicate a compensation rate of $374.76 per week. Employer argues, however, that the AWW used in determining benefits was correct, and therefore, Claimant is not entitled to receive any additional benefits during this time period.

Section 910 applies to the determination of the average weekly wage. Pursuant to Section 910, benefits should be determined using 910(a) or (b), if possible. If benefits cannot be determined pursuant to 910 (a) or (b), then 910(c) applies. §910(a) provides that:

> a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

Upon review, I find that Claimant worked substantially the whole of the year before the injury, since he worked 49 weeks of the year. Accordingly, it is possible to determine benefits pursuant to §910(a). As Claimant is a five-day worker, the AWW is equal to two hundred and sixty times the average daily wage. Claimant's total earnings for 1994 were $24,510.02. (EX 5). To determine the average daily wage, I must divide this amount by the number of days worked.[6]

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[6] Claimant contends that he worked 218 days, while Employer contends that Claimant worked 228 (including 10 days when Claimant was attending the National Baptist Convention.) I note, however, that Claimant testified that he was not paid for the days that he was attending the National Baptist Convention. Accordingly, it would not be appropriate to include them in the

Dividing $24,510.02 by 216, I find that Claimant's average daily wage was $113.47. Multiplying the average daily wage by 260, then dividing that number by 52, I find that Claimant's average weekly wage was $567.35.

As Claimant was paid temporary total disability during this period based on an average weekly wage of $471.35, I find that Claimant was underpaid. Accordingly, I find that Claimant is entitled to receive temporary total disability benefits for the period from January 12, 1995 to March 4, 1996, based on an average weekly wage of $567.35, less a credit to Employer for benefits already paid during that period

2. Claimant's Entitlement to Benefits from March 5, 1996 through March 25, 1996.

Claimant contends that he is entitled to permanent disability benefits from March 5, 1996, through March 25, 1996. Claimant was paid temporary total disability during this time period, however, the parties have stipulated that March 5, 1996 is the date of maximum medical improvement. (JX 1). Therefore, I find that Claimant is entitled to receive permanent total disability benefits during this time period. Additionally, the temporary total disability was paid based on an average weekly wage of $471.35, and must be adjusted to reflect the correct average weekly wage of $567.35, as discussed above.

3. Claimant's Entitlement to Benefits from March 26, 1996 to August 11, 1997

Claimant was employed by Employer during the period of time from March 26, 1996 to August 11, 1997, performing a series of light duty assignments. Claimant contends that he is entitled to permanent partial disability due to loss of wage earning capacity, or alternatively, that he is entitled to a de minimis award.

Permanent Partial Disability

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. If Claimant meets this burden, Employer must establish the existence of realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, taking into consideration Claimant's age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Mills v. Marine Repair Service*, 21 BRBS 115, 117 (1988); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976), *aff'g.* 2 BRBS 178 (1975); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, n.7 and related text (3d Cir. 1979). If Employer satisfies its burden, then Claimant, at most, may be partially disabled. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

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number of days worked for the purposes of determining Claimant's average daily wage. In addition, after review of CX 3, I find that Claimant worked 216 days, not 218 days, as contended by Claimant.

However, Claimant can rebut Employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986).

In the current case, the parties do not dispute that Claimant is unable to return to his usual employment. Therefore, the issue to be addressed is whether Employer has established the existence of suitable alternative employment and if so, whether Claimant has experienced a loss in wage earning capacity. An Employer can meet its burden of establishing the existence of suitable alternative employment by offering Claimant a job in its facility, including a light duty job, so long as it doesn't constitute sheltered employment. *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). Sheltered employment has been defined as a job where the employee is paid even if he cannot do the work and which is unnecessary. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). Light work duty which is tailored to a Claimant's medical restrictions is not sheltered employment, so long as it is necessary and profitable to the employer's business. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 (1987); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

The record supports Employer's contention that it provided suitable alternative employment and does not support a finding that Claimant's work upon his return was sheltered employment. When Claimant returned to work he received various light duty work assignments, such as painting lockers, making gaskets, cleaning the boiler shop, and doing office work. In July 1996, Claimant began working as a truck driver. When asked about these jobs at the hearing, Claimant testified that if he had not been doing the work, someone else would have to do it. (TX 105, 131). He also stated that he was able to give his Employer a "good day's work for a good day's pay." (TX 105, 129-130) Claimant testified that no doctor has ever told him to leave his job at Ingalls. (TX 130). Additionally, Employer has submitted the reports of Joe Walker, a Vocational Consultant. In his report dated October 31, 1997, Mr. Walker reviewed Claimant's work history at Ingalls to date and opined that "it is apparent that Mr. Thadison was performing modified work activity in keeping with his work restrictions." (EX 28 at 23). Additionally, in his report dated April 27, 1998, Mr. Walker opined that "Mr. Thadison . . . is performing suitable, modified work activity, that is, in all probability, in keeping with the permanent work restrictions outlined by Dr. Joe A. Jackson." (EX 28 at 18). I note that Mr. Walker's reports include a thorough summary and analysis of Mr. Thadison's physical conditions, work restrictions, and job activity. Therefore, I find his reports quite persuasive on this issue. Upon review of all the evidence submitted in this case, I find that the job which Claimant performs for Employer is not sheltered, and is clearly suitable alternative employment. Accordingly, I find that Employer has met its burden of establishing the availability of suitable alternative employment during the periods Claimant was working for Employer.

I must now determine whether Claimant experienced a loss in wage earning capacity during the period in question. I have previously determined that Claimant's AWW was $567.35. I must now determine Claimant's post-injury wage earning capacity. The threshold question is

whether the Claimant's post injury wages accurately reflect his wage earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796 (16 BRBS 56, 64 (CRT) (D.C. Cir. 1984). If they do not, then I must arrive at a specific dollar figure which fairly and reasonably represents his capacity. *Id.* at 796-97, 16 BRBA at 64; *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988). As mentioned above, typically the objective here is to ascertain Claimant's ability to command a wage for his labor in the open market. However, where the employer has provided the Claimant's with suitable, non-sheltered, alternative employment, then an inquiry into the Claimant's open market wages is irrelevant. *McCullough v. Marathon Letroueau Co.*, 22 BRBS 359, 366 (1989). Rather, his wages are representative of his wage earning capacity for purpose of the Act. *Id; Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172, (19865). In this instance, as stated above, Employer provided Claimant with such employment. I will therefore determine Claimant's weekly wage earning capacity by the same method used to determine AWW. The record shows that Claimant worked 179 days in 1996, and was paid $20,759.50 for the year. This indicates an average daily wage of $115.97. When multiplied by 260, then divided by 52, this reveals a weekly wage earning capacity for 1996 of $579.85. Similarly, the record indicates that Claimant worked 146.55 days in 1997, and was paid $18,480.59 for the year. This indicates an average daily wage of $126.10. When multiplied by 260 and divided by 52, this reveals an average weekly wage of $630.50. Finally, Claimant worked 73.8 days in 1998, and was paid $8,857.18 for the year. This indicates an average daily wage of $120.02. When multiplied by 260 and divided by 52, this indicates an average weekly wage of $600.10. These weekly wage earning capacities exceed Claimant's AWW prior to his injury ($567.35). Accordingly, I find that Claimant is not entitled to receive permanent partial disability benefits based on a loss of wage earning capacity. This finding is further supported by the fact that Claimant continues to be classified as a first class outside machinist, which was his classification prior to his injury. Therefore is earning the same wage that he would have been earning had the accident never occurred. Although Dr. Danielson identified a 9% disability to the Claimant as a whole person (CX 7), the Claimant has had no loss in wage earning capacity, and therefore, is not entitled to receive permanent partial disability benefits. Accordingly, I must consider whether it is appropriate in this case to grant a *de minimis* award.

Claimant's Entitlement to a *De Minimis* Award

Claimant contends that if he is not entitled to permanent partial disability benefits, then in the alternative he is entitled to receive a *de minimis* award. The Supreme Court has held that a *de minimis* award is appropriate when an employee's work related injury has not diminished his present wage earning capacity, but there is a significant potential that the injury will cause diminished capacity under future conditions. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S.Ct. 1953 (1997). The burden of proof, however, is on the Claimant to show the likelihood of a future decline in capacity; the administrative law judge may not make such an award based on mere speculation of future harm that is unsupported by any evidence of record. *Id., Smith v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 287 (1984).

Following the *Rambo* precedent, I find that Claimant has shown a significant potential that Claimant's injury will cause diminished capacity under future conditions. Claimant's treating physician assigned to Claimant a 9% impairment rating of the entire person. (CX 7 at 3, 5). Yet, as of the date of the hearing, this impairment has resulted in no permanent disability in an

economic sense because the Claimant has experienced no loss in wage earning capacity. However, I find that Claimant has shown a significant possibility that such an economic loss may come about. Claimant credibly testified that his symptoms are aggravated by the work that he performs. (TX 76-78). Claimant's testimony is corroborated by Dr. Jackson's report dated January 16, 1998, which states that Claimant's neck and low back pain is worsened whenever he tries to return to any activity. (CX 8 at 1). Based upon this credible evidence, it is reasonable to expect that Claimant's continued work will further aggravate his impairment. At some point, this aggravation may result in an actual and identifiable wage loss. Accordingly, I find that Claimant is entitled to a *de minimis* award of $1.00 per week retroactive to the date of March 25, 1995, the date on which Claimant's permanent total disability became partial.

Claimant's Entitlement to Benefits From August 11, 1997 to February 15, 1998

Claimant was laid off from his employment with Employer from August 11, to February 15, 1998. Claimant contends that he is entitled to receive permanent total disability benefits during this period because he made a diligent search for work within his restrictions, but was not able to find suitable alternative employment. Alternatively, Claimant argues that he is entitled to benefits for loss of wage earning capacity during this period. Employer contends that Claimant is not entitled to compensation during the period of layoff, because the layoff was unrelated to Claimant's disability.

I find that Claimant is entitled to receive permanent total disability benefits during the period that he was laid off. In *Mendez v. Nat'l Steel and Shipbuilding Co.*, 21 BRBS 22 (1988), the Claimant suffered a work-related injury, and was placed in a light duty job at Employer's facility. Claimant performed the light duty job until he was laid off because light work was no longer available. The Benefits Review Board held that where the Employer withdrew the light duty job, suitable alternative employment was no longer available. As the Employer had not met its burden of showing that other suitable alternative employment existed, the Board held that Claimant was entitled to receive permanent total disability benefits.

Applying the reasoning of the Benefits Review Board in *Mendez* to the current case, I find that when Claimant was laid off from his job at Employer's facility, the light duty job ceased to constitute suitable alternative employment. Accordingly, I must consider whether other suitable alternative employment existed, and determine the extent of Claimant's disability during the period of the layoff.

In the present case, Employer has proffered evidence of other employment opportunities available to Claimant during the period of the layoff. Specifically, Employer has offered the vocational rehabilitation report of Mr. Tom Stewart, dated October 20, 1997, which was submitted as EX 27. Based on Claimant's profile, Mr. Stewart identified the following jobs which he opined that Claimant could perform:

1. Security Guard, Gulf Coast Security Services ($5.15/hour; 40 hours per week)
2. Security Guard, Day Security Services ($5.15-$5.50/hour, 40 hours per week)
3. Security Guard, Swetman Security Services ($5.15/hour, 40 hours per week)

4. Security Guard, West Building Materials ($7.00/hour, 19.5 - 30 hours per week)
5. Gate Guard, Pinkerton Security Services ($5.15/hour, 16 to 24 hours per week)

(EX 27 at 17-18). Claimant can rebut Employer's showing of suitable alternate employment and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities, but was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. (1986). Claimant testified at the hearing that he applied for the jobs at Gulf Coast Security, West Coast Building Supply, and Day Detectives. (TX 67-73). He testified that he did not apply for one of the jobs, because it was in Pearlington, which is 50-60 miles from his home. He also testified that he did not apply for a job with Swetman Security in Biloxi because he did not have transportation to get there.[7] (TX 74). Claimant also testified that he applied for jobs at Ham Marine, Redman Homes, Home Depot, Labor Finders, Wal-Mart, Hudson's Hometown Supply, Hubble Supply, Gene Warr, Auto Zone, Toy Liquidation, K& B Drugstore, Telemarketer, and Gulfport Memorial Hospital, but that he was unable to find a job that was within his restrictions. (TX 67-73).

Based on the foregoing evidence, I find that Claimant diligently searched for employment. Accordingly, as Claimant was unable to find employment due to his diligent efforts, I find that Claimant has rebutted Employer's showing of suitable alternative employment, and accordingly, Claimant is entitled to receive permanent total disability benefits from August 11, 1997 to February 15, 1998.

Employer contends that it is entitled to a credit for the $4,680.00 paid to Claimant in unemployment benefits during the layoff period. The Act authorizes a credit or offset for workers' compensation benefits paid under any other workers' compensation law or for any advance compensation payments made by employer. 33 U.S.C. §§903(e) and 914(j). The statute, however, does not authorize a credit or offset for any unemployment compensation payments received by claimant during his disability. *See Marvin v. Marinette Marine Corp.*, BRB No. 82-787, 1986 WL 66397 (August 22, 1986); *Rayner v. Maritime Terminals, Inc.*, BRB No. 84-1281, 1988 WL 232815 (December 30, 1988). Accordingly, I find that Employer is not entitled to a credit for the unemployment benefits paid to Claimant during the layoff period.

Claimant's Entitlement to Benefits After February 16, 1998

As discussed above, I find that Claimant does not have a current loss in wage earning capacity due to his injury, and therefore, I find that Claimant is not entitled to receive compensatory benefits at this time. However, I find, as discussed above, that Claimant is entitled to a *de minimis* award, as there is a significant possibility that his wage earning capacity may decrease in the future due to his injury.

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[7] At his deposition, Claimant testified that at times he borrowed his daughter's car, but that he did not borrow her car to attend this interview. (EX 31 at 30-31).

ATTORNEY'S FEES

Section 28 of the Longshore Act provides for the recoupment of a Claimant's attorneys fees and costs in the event of a "successful prosecution." 33 U.S.C. §928. In the present case, Claimant has been awarded benefits. Therefore, Claimant's counsel is entitled to a fee for his work before the Office of Administrative Law Judges. Counsel for Claimant shall have thirty (30) days from the date of this order within which to file an application for attorney fees and costs incurred.

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record, I issue the following Order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

IT IS HEREBY ORDERED THAT:

1. Employer shall pay Claimant temporary total disability benefits for the period from January 12, 1995 to March 4, 1996, based on an average weekly wage of $567.35, less a credit to Employer for any benefits already paid during that period.

2. Employer shall pay Claimant permanent total disability benefits from March 5, 1996, through March 25, based on an average weekly wage of $567.35, less a credit to Employer for any benefits already paid during that period.

3. Employer shall pay Claimant $1.00 per week, effective March 25, 1996, based on permanent partial disability.

4. Employer shall pay Claimant permanent total disability benefits from August 11, 1997 to February 15, 1998.

5. Claimant is entitled to payment of reasonable and necessary medical expenses pursuant to §7.

6. Claimant's attorney is entitled to fees in an amount to be determined in a Supplemental Decision and Order.

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PAUL H. TEITLER
Administrative Law Judge

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